U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

The Honorable John Conyers
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for allowing me the opportunity to provide you with the views of the Department of Labor (DOL) concerning H.R. 3887, the"William Wilberforce Trafficking Victims Protection Act of 2007." While DOL supports reauthorization of the Trafficking Victims Protection Act, we have serious concerns regarding certain provisions in the bill, as outlined below.

Specifically, Section 202 (g) of H.R. 3887, *Protections for Workers Recruited Abroad,* creates a new federal program regulating activities of foreign labor contactors (FLCs). The administration of this new program ~~which~~ is similar in design to the farm labor contractor provisions of the Migrant and Seasonal Agricultural Worker Protections Act (MSPA) ~~is~~ assigned to DOL, as is the responsibility to promulgate implementing regulations.

DOL recognizes that some FLCs exploit foreign workers, and the Department condemns such practices in the strongest terms. DOL, however, has significant concerns, discussed below, regarding the feasibility of regulating and enforcing U.S. requirements in foreign countries. Consequently, we oppose the inclusion of this new, unfunded enforcement program in H.R. 3887.

Additional concerns regarding specific bill provisions:

Section 202(g)(2)—Disclosure

This section would require FLCs to ascertain and disclose seven specified terms and conditions of the employment [section 202 (g)(2)(A) to (G)] to each foreign worker at the time of recruitment, in English and in a language understood by the worker.

The goals of this provision are quite laudable, but DOL believes that the provision cannot achieve its aims. Section 202(g)(2) applies to actions to be taken almost exclusively in foreign countries by FLCs who may never enter the U.S. DOL investigation of FLC compliance in a foreign country is a virtually impossible task. The lack of resources and authority in foreign countries would likely preclude any meaningful enforcement of this element of the program.

Section 202(g)(4)—Registration

Section 202 (g)(4)(B) directs DOL to promulgate regulations establishing an electronic process for the investigation and approval of an application for a certificate of registration of an FLC within 14 days of filing. This process incorporates MSPA provisions [29 U.S.C. § 1812(1), (4), and (5)] requiring submission of a subscribed and sworn declaration stating the FLC's permanent residence and planned FLC activities; submission of a set of fingerprints; and a subscribed and sworn declaration consenting to a court designation of the Secretary of Labor to accept service of a summons if the FLC is unavailable.

Submission of fingerprint cards serves no purpose here, because DOL is provided no authority in the legislation to take action based on a check of such cards—unlike MSPA [29 U.S.C. § 1813(a)(5)(A)-(B)], which authorizes DOL to refuse to issue a farm labor contractor certificate to an applicant who has been convicted of certain crimes or felonies. Moreover, the addition of such authority to the legislation would have little impact, as DOL does not have the capability to run criminal checks in the FLC's country of residence.

Section 202 (g)(4)(E) directs DOL to establish a process for the receipt, investigation, and disposition of complaints regarding an FLC's compliance with the program. Similar to the H-1B provisions of the INA, such complaints are limited to aggrieved persons and organizations (including bargaining representatives) and must be filed within 12 months of the violation.

The use of H-1B-like provisions replicates two significant impediments to effective enforcement of H-1B requirements. First, DOL's investigative authority is limited to acting on complaints from specified sources. Under such limitations, DOL must ignore knowledge of potentially grievous violations that come to its attention if such knowledge does not come from the proper source. *See* 8 U.S.C. § 1182(n)(2).

Second, the direction in this section that DOL "*shall conduct an investigation*" (emphasis added) requires DOL to complete FLC investigations, even if doing so means giving less attention to enforcement of laws directly protecting U.S. workers. DOL has historically used the prosecutorial discretion provided in the Fair Labor Standards Act, the Family and Medical Leave Act, and other worker protection laws in its charge to prioritize the use of its enforcement resources. Mandated action on bona fide FLC complaints will force DOL to reallocate existing resources and thus lessen the enforcement of minimum wage, overtime, child labor, and family leave protections for U.S. workers.

Section 202 (g)(6)—Enforcement Provisions

Section 202(g)(6)(A) provides DOL administrative enforcement authority to impose a fine for a knowing or reckless failure to comply. Fines may be up to $4,000 per affected worker, or $10,000 per affected worker for a third offense.

The legislation provides no definition of the phrase "affected worker." No guidance is provided on whether this phrase refers to foreign workers, U.S. workers, or both; the scope of the effect—financial, scheduling, promotion, loss of job, etc.; and the duration of the effect. Regulatory efforts to define this phrase will be difficult in the absence of congressional guidance. DOL has experienced significant difficulty in successfully promulgating regulations with no basis in statutory language or legislative history. Such regulations are inevitably subject to extensive legal challenges stretching over many years. Effective enforcement is difficult in the interim.

Section 202(g)(6)(B) authorizes DOL to initiate civil litigation to seek remedial action, including injunctive relief; to recover damages suffered by any worker harmed by a violation, which shall include wages owed and any debts incurred or fees paid by such worker to any person in reliance on the representations of the defendant or agents of the defendant; or to ensure compliance.

It is not clear, however, that DOL may investigate and remedy situations where an FLC does not pay the "wages owed." There is no provision like the one in MSPA that states unequivocally that each contractor "shall pay the wages owed to such worker when due." Rather, this bill talks in terms of "violations," which may be interpreted as restricted to failure to disclose or a misrepresentation.

Moreover, the term "wages owed" is not defined. No guidance is provided on how to calculate such wages, what the wages are for, what wage rates should be used, whether they are retroactive and/or prospective, what period should be covered, whether mitigation should be considered, etc. Regulatory efforts to define this phrase will be virtually impossible in the absence of congressional guidance.

Further, the term "debts incurred or fees paid" is not defined. No guidance is provided on whether the nature of the debt or the fees is material to the determination of damages; whether any ancillary benefit accrued to the worker related to incurring the debt or paying the fee should be considered in calculating damages; and the extent to which DOL should consider in calculating damages the fact that factors other than the representations of the defendant were relied on to incur the debt or pay the fee. Regulatory efforts to define this phrase will be virtually impossible in the absence of congressional guidance. Moreover, DOL's ability to investigate the nature, ancillary benefit, or other factors relating to debts incurred or fees paid in other countries is virtually nonexistent.

Section 202 (g)(6)(B) indicates that any sums recovered in civil litigation shall be paid to the affected workers. Such sums not payable to the workers within 3 years shall be credited as an offsetting collection to the DOL appropriations account, for expenses incurred in the administration of this program, until expended.

The uncollected sums credited to the DOL appropriations account will not cover the cost of administering this program as it is an offset to the existing DOL appropriation. Rather than providing funding needed for this massive new program, this offset and the requirement that it be spent on administration of the FLC program will actually cause a

corresponding decrease in DOL's resources available to enforce minimum wage, overtime, child labor, family leave, and other U.S. worker protections.

Section 202 (g)(6)(C) stipulates that an employer who retains the services of an unregistered FLC or uses an FLC in knowing or reckless disregard that the FLC violated provisions of this program will be responsible for the FLC's violations of section 202(g)(5) to the same extent as if the employer had committed the violations.

Given DOL's inability to enforce provisions of this program applicable to foreign-based contractors (see discussion above) DOL enforcement will, by default, focus only on U.S. employers who use this program.

I appreciate the opportunity to express the Department's views on this important legislation.

The Office of Management and Budget has advised that there is no objection to the presentation of these views from the standpoint of the Administration's program.

Sincerely,

Paul DeCamp
Administrator

cc: The Honorable Lamar Smith, Ranking Member